Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

No. 79-1792

In The
Supreme Court Of The United States

October Term, 1979

McALESTER CORPORATION, a corporation,
doing business as ALDRIDGE HOTEL,
HOTELS SERVICE COMPANY, a corporation,
TULSA APARTMENTS CORPORATION, a corporation,
CHARLES H. ALBERDING, an individual,
and J. E. SCALLY, an individual,

Petitioners,

v.

RAY MARSHALL, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PHIL FRAZIER and ROBERT S. FARRIS
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RAY MARSHALL, SECRETARY OF LABOR,
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Respondent.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioners respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the

United States Court of Appeals for the Tenth Circuit entered in this matter on February 11, 1980.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is unreported and is printed in Appendix A hereto. The opinion of the United States District Court for the Eastern District of Oklahoma is reported at 438 F.Supp. 1005 (1977).

JURISDICTION

The judgment of the Court of Appeals was entered on February 11, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

Whether the District Court improperly admitted into evidence under Rule 803 (6), Federal Rules of Evidence, the operational reports of 33 non-party "hotel" corporations in order to establish an "enterprise" with an annual gross volume of business done of over $250,000 under the Fair Labor Standards Act, 29 U.S.C. §201-219, and whether the Court of Appeals erred in circumventing a ruling on that issue by holding that an "enterprise" was established because of testimony concerning the gross volume of said 33 non-party "hotel" corporations when

there was evidence in the record showing that some of those "hotels" catered to permanent residents and were thus not involved in "related activities" so as to constitute an "enterprise."

STATUTES AND RULES INVOLVED

29 U.S.C. §203(r) — "Enterprise" means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose, and includes all such activities whether performed in one or more establishments or by one or more corporate or other organizational units . . .

29 U.S.C. §203(s)(1) — "Enterprise engaged in commerce or in the production of goods for commerce" means an enterprise which has employees engaged in commerce or in the production of goods for commerce or employees handling, selling, or otherwise working on goods or material that have been moved in or produced for commerce by any person, and which . . . beginning February 1, 1969, is an enterprise whose annual gross volume of sales made or business done is not less than $250,000 . . .

Rule 803(6), Federal Rules of Evidence — The following are not excluded by the hearsay rule even though the declarent is available as a witness: Records of a regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the

time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

STATEMENT OF THE CASE

This action was brought by the Secretary of Labor under Section 17 of the Fair Labor Standards Act of 1938, 29 U.S.C. §201-219, hereinafter referred to as the Act, to enjoin the defendants from violating the minimum wage requirements of the Act, 29 U.S.C. §206, and to restrain the continued withholding of back wages due as a result of the violations to persons employed at the Aldridge Hotel in McAlester, Oklahoma. The petitioners herein were the defendants in the trial court.

THE EVIDENCE

During the periods relevant to this action, the Aldridge Hotel was owned by Tulsa Apartments Corporation, from May 1, 1973, until December 31, 1973, and the Hotel was thereafter owned by McAlester Corporation from January 1, 1974, until November 11,

1976. At all times material to this action, Charles H. Alberding was the President of Tulsa Apartments Corporation and McAlester Corporation, and he and his wife and daughters owned a controlling interest in those corporations. During the same period, J. E. Scally was the Vice President of those two corporations and together with Charles H. Alberding and Mr. Alberding's wife constituted the boards of directors of the two corporations.

In order to reach the Act's jurisdictional requirement that there be an enterprise engaged in commerce with an annual gross volume of business done of not less than $250,000, the Secretary contended that the Aldridge Hotel together with 33 other "hotels" owned by 33 separate and distinct corporations which were not named as defendants to the suit constituted a single enterprise within the meaning of 29 U.S.C. §203(r). In fact, it was admitted by the Secretary that during the relevant times of this action the annual gross volume of business done by the Aldridge Hotel was less than the jurisdictional minimum of $250,000. So it was only by aggregating the annual gross volume of business done by the Aldridge Hotel with the annual gross volume of business done by the 33 non-party corporations that the Secretary could place the owners of the Aldridge Hotel under the provisions of the Act.

The ownership and management of these 33 non-party corporations were the same as for the Tulsa Apartments Corporation and McAlester Corporation in that Charles H. Alberding was the President of the 33 non-party corporations, and he and his wife and daughters owned a controlling interest in the corporations. J. E. Scally was also the Vice President of the 33 non-party corporations and together with Charles H. Alberding and Mr. Alberding's wife constituted the boards of directors of the 33 corporations. However, all of the 33 non-party corporations are separate and distinct corporations.

All of the "hotels" operated by the 33 non-party corporations are referred to as the "Alsonett Hotels". However, "Alsonett" is not a legal entity of any kind, but instead is merely a banner given thirty years ago to those properties in which Charles H. Alberding had an interest. The word "Alsonett" itself is simply a combination of the last names of three men whose combined idea it was thirty years ago to try and get into the hotel business.

Petitioners argued in the Trial Court that these 33 non-party corporations could not be considered as part of a single "enterprise" with the Aldridge Hotel because they did not involve related activities. Specifically, it was argued that some of the "hotels" were actually apartments because they catered primarily to permanent residents as opposed to transient guests. Petitioners also argued that

even if the required enterprise could be shown that the documents offered by the Secretary to aggregate the $250,000 jurisdictional minimum were improperly admitted as business records in violation of Rule 803(6), Federal Rules of Evidence. Specifically, it was argued that the testimony adduced from the sole sponsoring witness of the operational reports was deficient in all three component parts necessary for admissibility.

THE RULINGS BELOW

The District Court held that the 33 non-party "hotel" corporations (the "Alsonett Hotels"), including the Aldridge Hotel, constituted an enterprise within the meaning of the Act. The District Court also allowed the admission of the operational reports of the 33 non-party "hotel" corporations and thus aggregated the total gross volumes of business done to reach the jurisdictional minimum of $250,000. Consequently, in connection with their ownership of the Aldridge Hotel, the Court ordered Tulsa Apartments Corporation to pay back wages and accrued interest of $16,937.92 and ordered the McAlester Corporation to pay back wages and accrued interest of $55,214.00.

The Court of Appeals affirmed the finding of the District Court of an "enterprise" with an annual gross volume of business done in excess of $250,000. However,

the Court of Appeals circumvented ruling on the admissibility of the operational reports by holding that the testimony of Charles H. Alberding, to the effect that the "annual gross volume of all hotels would be somewhere in excess of $2,000,000.00", was sufficient to support the finding of the Trial Court as to the "enterprise" issue.

Petitioners submit that the Court of Appeals erred by taking the word "hotels" literally when there was evidence in the record to show that some of the so-called "hotels" catered primarily to permanent residents and thus were not performing related activities to the Aldridge Hotel so as to constitute an "enterprise".

REASONS FOR GRANTING THE WRIT

Certiorari should be granted in this case because the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings in cases of this type that petitioners were wrongfully held to be subject to the provisions of the Fair Labor Standards Act.

The initial point of analysis begins with a definition of the term "enterprise". This honorable Court stated in the case of *Brennan v. Arnheim & Neely, Inc.*, (1973) 410 U.S. 512 that:

> "Under the 'enterprise' definition of 29 U.S.C. §203(r), the three main elements of

> statutory definition are related activities, unified operation or common control, and common business purpose."

It is the "related activities" component of the "enterprise" definition with which petitioners take issue in the case at bar.

While the term "related activities" is not defined in the Act, it was held in *Hodgson v. University Club Tower, Inc.*, 10 Cir., 466 F.2d 745, that activities are related when they are the "same or similar". Under this standard, the Court in *Hodgson, supra,* went on to hold that the differences between hotels and apartment houses outweigh their similarities. It was reasoned that there was a meaningful distinction between establishments providing temporary quarters for transients and travelers and establishments providing a permanent place of residence for homemakers.

In fact this analysis was specifically utilized in the case at bar by the District Court to find that the Tulsa Apartments owned by Tulsa Apartments Corporation were not the same or similar and thus were not related to the activities of the Aldridge Hotel. Having recognized that distinction as it affected the Tulsa Apartments, the District Court then ignored the distinction by disregarding or overlooking testimony elicited by the Secretary which indicated that in quite a number of the "hotels"

owned by the 33 non-party corporations there were accommodations for permanent guests. In spite of the fact that the Secretary emphasized during his questioning of Charles H. Alberding that most or at least quite a number of the 33 non-party "hotels" had accommodations for permanent guests and even after going on to bring out that it was an established policy of those "hotels" to develop a more permanent trade, the District Court erroneously found that the 33 "Alsonett Hotels", including the Aldridge Hotel, constituted an enterprise within the meaning of the Act.

The Court of Appeals compounded this error when it sidestepped ruling on the admissibility of the operational reports of the 33 non-party "hotels" for the purpose of aggregating their annual gross incomes. Instead, the Court of Appeals circumvented ruling on this issue by holding that the $250,000 jurisdictional minimum had been established by the testimony of Charles H. Alberding in which he replied in the affirmative to a question by the Respondent's counsel as to whether the annual gross volume of all his "hotels" would be somewhere in excess of $2,000,000. As was just shown above, respondent's own counsel had just elicited testimony from Charles H. Alberding that most or quite a number of the so-called "hotels" had accommodations for permanent guests and even had a policy to develop more permanent trade. That

being the case, it was error for both the District Court and the Court of Appeals to include all of the 33 non-party "hotels" in the alleged enterprise with the Aldridge Hotel so as to bring the petitioners within the Act. In view of the testimony concerning the hotel versus apartment status of the 33 non-party "hotels", to lump them all together as hotels is contrary to the holding of *Hodgson, supra.*

Once this distinction between hotels and apartment houses is applied to the so-called "hotels" owned by the 33 non-party corporations, it becomes clear why the evidentiary ruling of the District Court on the admissibility of the operational reports of those corporations is so pivotal. For without the aggregate annual gross volume of business done by the 33 non-party corporations as reflected in these operational reports, the jurisdictional minimum of $250,000 would not have been reached as to the Aldridge Hotel, and thus the Secretary would not have had a case. In attempting to have these operational reports admitted into evidence, the respondent sponsored them through the testimony of an employee of Hotels Service Company. Hotels Service Company is a corporation owned and operated in the same manner as Tulsa Apartments Corporation and McAlester Corporation. However, rather than owning a hotel or apartment house, Hotels Service Company provides services to such businesses in the form of engineering, selection of equip-

ment, accounting, taxes and finance. Hotels Service Company's business consists of providing such services to participating hotels, apartments, country clubs, etc. and not just to those various businesses in which Charles H. Alberding has interests.

It quickly became apparent during the testimony of this employee, who was head of the accounting office of Hotels Service Company, that she knew absolutely nothing about the derivation of these operational reports which were received by her office every month.

In pertinent part, the business records exception to the rule against hearsay evidence, found in Rule 803(6), of the Federal Rules of Evidence, has three component parts which are: (a) a . . . report . . . made at or near the time by, or from information transmitted by, a person with knowledge, (b) if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the . . . report . . ., (c) all as shown by the testimony of the custodian or other qualified witness.

None of the above requirements were met by the respondent in offering these reports into evidence.

The employee did not know who prepared the reports nor what information was used to prepare them. She did not know if the reports were accurate nor who sent the

unsigned reports. She did not know when the reports were prepared or if they were prepared in the regular course of business of the various clients of Hotels Service Company. It was not the regular practice of Hotels Service Company to make these reports nor was the employee the custodian or other qualified witness because she could not vouch that the requirements of Rule 803(6) had been met.

Despite the employee's complete lack of knowledge concerning the operational reports of the 33 non-party "hotels" corporations, the Trial Court admitted them into evidence and thus used the aggregate annual gross volumes contained therein to find an "enterprise" and thus bring the petitioners within the Act. This erroneous admission of evidence violated a fundamental evidentiary rule which was stated as follows in *United States v. Blake*, 5 Cir., 488 F.2d 101:

> "While the trial court does have wide discretion in determining the admissibility of documents as business records, (citations omitted), there must be minimal authentication proof to give them reliability."

CONCLUSION

WHEREFORE, petitioners respectfully pray that a Writ of Certiorari be granted.

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Tulsa, Oklahoma 74104

Counsel for Petitioners

CERTIFICATE OF SERVICE

I, ROBERT S. FARRIS, a member of the Bar of the Supreme Court of the United States and one of the counsel of record for the petitioners herein, hereby certify that on May 9, 1980, pursuant to Rule 33, Rules of the Supreme Court, I served three copies of the foregoing Petition for Certiorari on Ray Marshall, Secretary of Labor, respondent herein, by depositing such copies in the United States Post Office, Tulsa, Oklahoma, with first class postage prepaid, properly addressed to the post office address of CARIN ANN CLAUS, Solicitor of Labor, the above named respondent's counsel of record, at U.S. Department of Labor, Washington, D.C. 20210, and to Solicitor General, Department of Justice, Washington, D.C. 20530.

All parties required to be served have been served.

DATED May 9, 1980.

ROBERT S. FARRIS
of FRAZIER, SMITH & FARRIS
1424 Terrace Drive
Tulsa, Oklahoma 74104

APPENDIX

APPENDIX A

OPINION BELOW

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 78-1303
No. 78-1304

RAY MARSHALL, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,

Appellant — Cross-Appellee,

v.

McALESTER CORPORATION, et al.,

Appellees — Cross-Appellants

Appeal From The
United States District Court
For The
Eastern District Of Oklahoma
(D.C. # 75-117-C)

Phil Frazier of Frazier, Graham, Smith & Farris, Tulsa, Oklahoma, for Appellees — Cross-Appellants.

David Grant, United States Department of Labor (Carin Ann Clauss, Solicitor of Labor, Donald S. Shire, Associate Solicitor, Dennis D. Clark and Ouida C. Prevost, attorneys, and James E. White, Acting Regional Solicitor, on the Brief), for Appellants — Cross-Appellees.

Before SETH, Chief Judge, HOLLOWAY, Circuit Judge, and BROWN, District Judge*.

PER CURIAM.

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*Honorable Wesley E. Brown, of the District of Kansas, sitting by designation.

This is an appeal of an action brought by the United States Secretary of Labor to enjoin defendants from violating the minimum wage and recordkeeping requirements of the Fair Labor Standards Act, 29 U.S.C. §§201-219. The trial court enjoined defendant McAlester Corporation, d/b/a Aldridge Hotel, from violating minimum wage provisions of the Act. Defendants McAlester Corporation and Tulsa Apartments Corporation, in connection with their ownership of the Aldridge Hotel, were enjoined from withholding payment of minimum wages and interest to employees of the Aldridge

Hotel. Defendants Charles Alberding and J. E. Scally were held not to be "employers" under the Act and the action was dismissed as to them. The Secretary of Labor appeals dismissal of the suit as to Alberding and Scally, and defendants cross-appeal as to those portions of the judgment adverse to them.

There are two main issues to be considered on appeal: First, whether there was substantial evidence to support the finding of the trial court that the "enterprise" had a gross volume of over $250,000; and second, whether defendants Alberding and Scally were "employers" under the Fair Labor Standards Act.

The action concerns the employees of the Aldridge Hotel in McAlester, Oklahoma. This hotel was owned by defendant Tulsa Apartments Corporation for part of the time in question and by defendant McAlester Corporation for a time. Defendant Charles Alberding owned the controlling interest in McAlester Corporation and in thirty-three other nonparty corporations operating hotels (the "Alsonett Hotels"). Charles Alberding was president and defendant J. E. Scally was vice-president of McAlester Corporation and each of the thirty-three nonparty corporations. Hotels Service Company, owned by J. E. Scally and the wife of Charles Alberding, provides such services to hotels as improvements, engineering services, accounting services, tax returns, and procuring financial assistance and insurance. The great majority of this company's business is done for the Alsonett Hotels and other Alberding interests, including the Aldridge Hotel.

In order that an "enterprise" be subject to the Fair Labor Standards Act, it must have an annual gross volume of at least $250,000. 29 U.S.C. §203(s)(1). The trial

court found that the gross volume of the entire Alsonett Hotels enterprise was to be considered and sufficient to bring the Aldridge Hotel under the Act. Defendants on appeal do not dispute the proposition that the hotels owned by Charles Alberding may be considered together with the Aldridge Hotel to constitute a single "enterprise." Rather, they argue that the financial records admitted to show annual gross volume of business did not come within the business records exception to the hearsay rule, Fed. R. Evid. 803(6). It is, however, not necessary to decide the rule 803(6) issue because Mr. Alberding in his testimony stated that the "annual gross volume of all hotels would be somewhere in excess of two million dollars." This is sufficient to support the finding of the trial court as to the "enterprise" issue.

The Secretary in his cross-appeal asserts that the trial court erred in holding that defendants Alberding and Scally were not "employers" under the Fair Labor Standards Act. It is urged that the court used the wrong standard for determining whether defendants were employers, and that the court improperly ignored a stipulation and an admission by defendants to the effect that defendants Alberding and Scally were indeed "employers" under the Act.

The term "employer" is defined in Section 203(d) as "any person acting directly or indirectly in the interest of an employer in relation to any employee." As the Fourth Circuit has said, this definition is quite broad, "and courts have accordingly found an employment relationship for purposes of the Act far more readily than would be dictated by common law doctrines." Schultz v. Falk, 439 F.2d 340, 344 (4th Cir.), *vacated on other grounds*, 414 U.S. 190.

The trial court here found there was no employment relationship because there was no showing of " 'substantial control of the terms and conditions of the work of [the] employees' of the Aldridge Hotel in McAlester, Oklahoma. Falk v. Brennan, 414 U.S. 190." Marshall v. McAlester Corp., 438 F. Supp. 1005, 1011 (E.D. Okla). This is, however, not the standard contemplated by the Act, but in any event the pretrial order contained a stipulation by the parties in part as follows:

> "Defendant, Charles H. Alberding, . . . has been, an officer of defendants, McAlester Corporation, Hotels Service Company and Tulsa Apartments Corporation, . . . acting directly and indirectly in the interest of said corporations in relation to their employees."

The same stipulation was made as to J. E. Scally. The language of this stipulation tracks the Act's definition of "employer." "The trial court may not disregard the facts stipulated to by the parties or require evidence to support them." United States v. Sommers, 351 F.2d 354, 357 (10th Cir.). "As a general rule, a stipulation is a judicial admission binding on the parties making it, absent special considerations." Vallejos v. C. E. Glass Co., 583 F.2d 507, 510 (10th Cir.), It was error to ignore the stipulation of fact that set the defendants well within the Act's definition of "employers."

It may also be noted that the attorney for the defendants conceded at trial that Mr. Alberding and Mr. Scally would be considered "employers" under the Act if the Government carried its burden of proof that the various hotels constituted an "enterprise," thus bringing

the Aldridge Hotel employees under the Act. He acknowledged that, "If we are under the act we will admit that under the act we would be employers." As this burden was met, it was error to ignore the concession and the stipulation by the parties.

The judgment is affirmed as to the proof of the existence of an "enterprise" with annual gross volume of business in excess of $250,000. The judgment insofar as it holds that defendants Alberding and Scally are not "employers" is reversed and the case is remanded.

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v.

RAY MARSHALL, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,

Respondent.

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Counsel for Petitioners

APPENDIX B

Ray MARSHALL, Secretary of Labor,
United States Department of
Labor, Plaintiff,

v.

McALESTER CORPORATION, a corporation,
doing business as Aldridge Hotel,
Hotels Service Company, a corporation,
Tulsa Apartments Corporation, a corporation,
Charles H. Alberding, an Individual,
and J. E. Scally, an Individual,
Defendants.

No. 75-117-C.

United States District Court,
E. D. Oklahoma.

March 31, 1977.

As Amended May 19, 1977.

William J. Kilberg, Sol. of Labor, Washington, D. C., Ronald Gaswirth, Regional Sol., William E. Everheart, Robert Maris, Dallas, Tex., for Ray Marshall, Secretary of Labor, U. S. Dept. of Labor.

Phil Frazier, Tulsa, Okl., for defendants.

MEMORANDUM OPINION

MORRIS, Chief Judge.

I. Introduction.

This is a civil action brought by the Secretary of Labor, United States Department of Labor, pursuant to section 17 of the Fair Labor Standards Act of 1938, 29 U.S.C. § 217 (1970), hereinafter referred to as the Act, to enjoin defendants from violating the minimum wage and recordkeeping provisions of the Act, and to restrain the withholding by defendants of payment of any unpaid minimum wages found by the court to be due defendants' employees under the Act, together with interest thereon at the rate of 6 percent per annum from the dates such amounts became due. Trial was had to the court, sitting without a jury, on November 11, 1976.

Plaintiff claims that the defendants, together with certain other hotel corporations owned or controlled by the individual defendants, constitute an enterprise engaged in commerce or in the production of goods for commerce, 29 U.S.C. §§ 203(r), 203(s) (Supp. V, 1975), and are therefore subject to the minimum wage and recordkeeping provisions of the Act. 29 U.S.C. §§ 206, 211(c), 215 (1970). Plaintiff seeks an order restraining the withholding by defendants of payment of minimum wages which accrued within three years prior to the commencement of this action, since, according to plaintiff, defendants willfully violated the Act and are therefore subject to the three year statute of limitations of section 6(a) of the Portal-to-Portal Act, 29 U.S.C. § 255(a) (1970).

Defendants contend that the enterprise provisions of the Fair Labor Standards Act do not bring them within the coverage of the Act, since they do not perform related activities through unified operation or common control for a common business purpose. See 29 U.S.C. § 203(r) (Supp. V, 1975). Alternatively, defendants contend

that the two year statute of limitations applies, since they did not willfully violate the Act, if at all.

Upon consideration of all the evidence adduced at trial the court makes the following findings of facts and conclusions of law:

II. Findings of Fact.

1. Defendant, McAlester Corporation, during the period since January 1, 1974, has been a corporation authorized to do business in the state of Oklahoma, having an office and place of business at 2nd and Carl Albert Parkway, McAlester, Oklahoma, within the jurisdiction of this court, where it is doing business as the Aldridge Hotel.

2. Defendant, Tulsa Apartments Corporation, at all times material to this action,[1] has been a corporation authorized to do business in the state of Oklahoma having its principal place of business at 9 West 9th Street, Tulsa, Oklahoma, within the jurisdiction of this court. Tulsa Apartments Corporation owned the Aldridge Hotel until December 31, 1973,[2] before it was sold to

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1 This action was commenced on May 1, 1975, when the plaintiff filed his complaint. Depending on whether the two or three year statute of limitations provision is applicable, the material time in this lawsuit encompasses either the period from May 1, 1972, until November 11, 1976 (the date of trial), or, in the absence of any willful violations, from May 1, 1973, until November 11, 1976. The facts as found by the court apply to both the longer and the shorter period.

2 It is not clear from the evidence for what period of time Tulsa Apartments Corporation owned the Aldridge Hotel. In its answers to plaintiff's interrogatories Tulsa Apartments Corporation stated that it owned the Aldridge Hotel from January 1, 1967, until December 31, 1973. Plaintiff's Exhibit No. 51, at 3. However, defendant Alberding testified that the Aldridge Hotel was owned by Tulsa Apartments Corporation from January 1, 1971, until December 31, 1973.

defendant McAlester Corporation on January 1, 1974. See Fact No. 1, supra.

3. Defendant, Hotels Service Company, at all times material to this action, has been a corporation authorized to do business in the state of Oklahoma, having an office and place of business at 820 South Main, Tulsa, Oklahoma, within the jurisdiction of this court.

4. Defendant, Charles H. Alberding, is a resident of the city of Chicago, Illinois, and maintains an office at 9 East Huron, Chicago, Illinois. Defendant Alberding, at all times material to this action, has been an officer of defendants, McAlester Corporation, Hotels Service Company, and Tulsa Apartments Corporation.

5. Defendant, J. E. Scally, currently residing in the state of Missouri, was at all times material to this action an officer of defendants, McAlester Corporation, Hotels Service Company and Tulsa Apartments Corporation, and maintained an office at 820 South Main, Tulsa, Oklahoma.

6. The Aldridge Hotel at McAlester, Oklahoma, has been doing business as a hotel at all times material to this action.

7. Defendant Alberding, together with his wife and daughters, own controlling interests in at least 33 of the 36 corporations listed on Schedule A to Plaintiff's Exhibit No. 47.[3] By defendant Alberding's own admission, all the corporations set forth in Plaintiff's Exhibit No. 47 in which he, his wife and daughters own a controlling

3 Defendant Alberding testified that he, his wife and daughters owned a controlling interest in all but three of the 36 corporations listed on the exhibit.

interest operate hotels with the exception of the Tulsa Apartments Corporation.

8. Defendant Alberding's wife, B. W. Alberding, and defendant Scally each own 50 shares of the outstanding 100 shares in defendant Hotels Service Company. Plaintiff's Exhibit No. 49. Defendant Alberding is the president of this corporation.

9. Defendant Alberding, at all times material to this action, was the president of the 33 corporations listed in Plaintiff's Exhibit No. 47, in which he and his family admittedly own a controlling interest. See Fact No. 7, supra. Defendant Scally, at all times material to this action, was the vice-president of these corporations, and together with the defendant Alberding and Alberding's wife constituted the boards of directors of these corporations. See Plaintiff's Exhibits Nos. 47, 48, 49, 50, 51.

10. The majority of the 33 corporations contained in Plaintiff's Exhibit No. 47, in which defendant Alberding and his family own a controlling interest, Fact No. 7, supra, own hotels which appear on a list entitled "Alsonett Hotels—Tulsa Office," Plaintiff's Exhibit No. 3, and are listed as accounts receivable on defendant Hotels Service Company's balance sheet of September, 1975. Plaintiff's Exhibit No. 5.

11. The list entitled "Alsonett Hotels—Tulsa Office" was sent from the Chicago or the Tulsa office to the managers of the hotels in which defendant Alberding owned an interest.[4]

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4 These hotels will be hereinafter referred to as Alsonett Hotels.

12. "Alsonett Hotels" is not a legal entity of any kind. The name "Alsonett" is derived from the last names of the three men whose combined idea it was 30 years ago to try to get into the hotel business. The names are: Alberding, Gibson and Connett. Each Alsonett Hotel is owned by a separate corporation. From a financial point of view each must stand or fall on its own. Some have failed and others have succeeded. One purpose in so organizing was to avoid inter-hotel FICA liabilities. To organize in this fashion was also conceived to be better from a business and tax point of view. "Alsonett" is simply a banner as to those properties in which defendant Alberding has an interest. "Alsonett" has never had a bank account, the name is not used in the name of any property in which defendant Alberding has purchased an interest and it has no "800" long-distance telephone number. There is no common bank account for Alsonett Hotels and losses from one Alsonett Hotel have never been offset against gains from another Alsonett Hotel. The manager of each Alsonett Hotel is charged with the responsibility of running the hotel. He hires, fires, and determines the wage scales for the employees. Books and records are kept at each hotel and local bank accounts are maintained in the city in which the hotel is situated. Revenues from each operation are deposited in the local bank account.

13. Defendant Alberding hires and fires most of the managers of the Alsonett Hotels. Defendant Scally hired and fired some of the managers usually after consultation with Alberding. Alberding sets the salaries of the managers and they consult with him on most things. When loans are made Alberding usually signs the loan papers.

14. Defendant Alberding caused Mrs. Gladys Hyde (formerly Lockhart), manager of the Aldridge Hotel at McAlester from September 1967 until April 1974, to be transferred between Alsonett Hotels. She managed 3 Alsonett Hotels before coming to the Aldridge.

15. It is defendant Alberding's policy to provide rooms free of charge in the Alsonett Hotels to certain employees of the corporations in which he and his family own an interest. This is limited to persons who have an ownership interest, are part of the management or are key employees. Furnishing rooms under the circumstances described is a recognized industry policy.

16. Now and again furniture has been transferred between Alsonett Hotels.

17. Defendant Alberding's signature appears on the bank account signature cards for all of the corporations in which he has an interest.

18. Defendant Hotels Service Company provides a wide variety of services on a fee basis to hotels, some of which are Alsonett Hotels and some of which are not. However, 85 to 90 percent of Hotels Service Company's business consists of providing services to Alsonett Hotels and other corporations in which defendant Alberding and his family own an interest. The remainder of its business is directed towards hotels in which defendant Alberding does not have any interest.[5] A cut-rate fee is charged for services rendered to Alsonett Hotels as compared to the fee charged to other hotels. The fee is based on a percentage of income. If the company is making nothing it owes nothing for the service rendered.

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5 Defendant Alberding has no ownership interest with respect to 3 of 53 corporations listed as accounts receivable of defendant Hotels Service Company. Plaintiff's Exhibit No. 5.

19. Defendant Hotels Service Company provides engineering services for Alsonett Hotels in connection with the selection of equipment for laundries, construction of new wings, and procurement of elevators. In connection with improvements it handles such matters as design, studies, layouts, type of equipment, specifications, bidding, awarding of contracts, inspection and performance. It may or may not procure the finances needed for improvements. Hotels Service Company prepares income tax returns for about 60 percent of the Alsonett Hotels on the basis of the monthly operational reports sent to it by them. It also provides services to such hotels in regard to insurance, food, air conditioning, accounting, real estate taxes and finances. A number of these services were provided to the Aldridge Hotel and all were available to it when needed.

20. The following individuals are key people in the defendant Hotels Service Company organization who perform a variety of services for the Alsonett Hotels:

(a) Ray Ritter is a "travelling trouble-shooter." If a vacancy occurs in a hotel manager position, Ritter takes over temporarily. He trains new managers, checks on the performance of current managers, and communicates with defendant Alberding. Ritter is listed as "Hotel Mgm't Spec." on a list entitled "Tulsa Office, Alsonett Hotels," and his address is listed thereon as "Tulsa Office" Plaintiff's Exhibit No. 4. He does not work for defendant Hotels Service Company on a fulltime basis but has some business interests of his own in Siloam Springs, Arkansas.

(b) Ben Sweet is an expert elevator consultant living in Tulsa, Oklahoma. See Plaintiff's Exhibit No. 4.

(c) H. Ray, whose name does not appear on Plaintiff's Exhibit No. 4, deals with problems concerning refrigeration, air conditioning and boilers.

(d) Defendant Scally was vice-president and immediate supervisor with respect to all employees of defendant Hotels Service Company whose names are listed on Plaintiff's Exhibit No. 4.

21. Hotels Service Company has on occasion borrowed money from some Alsonett Hotels; also, on occasion, it has loaned money to other Alsonett Hotels; it does not act as a joint purchasing agent for Alsonett Hotels.

22. Defendant Scally, a professional engineer and vice-president of Hotels Service Company, acted as a consultant to the Royal Orleans Hotel in New Orleans, La., which is not an Alsonett Hotel. He made all the studies, layouts and designs for that hotel.

23. The managers of the Aldridge Hotel, during substantially all of the time material to this action, were in charge of the operations of the hotel. They hired, fired, and determined the work schedules for desk clerks, maids, janitors and elevator operators. Except for the period of time when it was leased out, they exercised the same authority over cashiers, bus boys and waitresses in the coffee shop. The managers kept the books and accounting records at the hotel and maintained a bank account at the local McAlester bank. A monthly report was sent to defendant Alberding in Chicago and to defendant Scally in Tulsa. Insurance was procured by defendant Hotels Service Company on the Aldridge Hotel and numerous other Alsonett Hotels under a group policy. A group policy afforded a lower premium. The "Insured's Name and Mailing Address" as listed in the

policy were "C. H. Alberding and/or Alsonett Hotels and/or Hotels Service Company and/or subsidiaries and/or affiliated companies or corporations as now are hereinafter constituted as their interest may appear Alsonett Hotel, P.O. Box 1379, Tulsa, Oklahoma."

24. At all times material to this action, except during the periods when the coffee shop of the Aldridge Hotel was leased out,[6] the coffee shop employees of the Aldridge Hotel in McAlester regularly handled food products which were produced outside the state of Oklahoma. Plaintiff's Exhibit No. 50, at 2.

25. The maids employed at the Aldridge Hotel in McAlester have regularly handled janitorial supplies which were manufactured outside the state of Oklahoma. Id. at 3; Plaintiff's Exhibit No. 51, at 4.

26. The room clerks employed at the Aldridge Hotel in McAlester have regularly received room reservations from hotel customers located outside the state of Oklahoma. Plaintiff's Exhibit No. 50, at 3; Plaintiff's Exhibit No. 51, at 4.

27. The Aldridge Hotel in McAlester, Oklahoma, at all times material to this action and during its ownership by defendant Tulsa Apartments Corporation and defendant McAlester Corporation, had employees engaged in commerce or in the production of goods for commerce, or employees handling, selling or otherwise working on goods or materials that have been moved in or produced for commerce.

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6 Pearl Pettigrew, manager of the Aldridge Hotel in McAlester from August 1974 until July 31, 1976, testified that the coffee shop was leased out on March 15, 1975. Mrs. Lozano, who was a waitress in the coffee shop, testified that it was leased out in March of 1975.

28. Defendant Tulsa Apartments Corporation's annual gross sales derived from the Aldridge Hotel in McAlester in 1973 amounted to $140,498.47. Plaintiff's Exhibit No. 51.

29. Defendant McAlester Corporation's annual gross sales derived from the Aldridge Hotel in McAlester amounted to $119,191.10 in 1974 and $93,811.02 in 1975. Plaintiff's Exhibit No. 51.

30. Defendant Hotels Service Company's annual gross sales during the years 1973 through 1976 ranged from approximately $36,000.00 to approximately $65,000.00.

31. In 1973 defendant, Tulsa Apartments Corporation, with respect to its ownership of the McAlester Aldridge Hotel only, and defendant Hotels Service Company had a combined aggregate annual gross volume of sales made or business done in an amount of less than $250,000.00.

32. During the years of 1974, 1975 and 1976 defendant McAlester Corporation, with respect to its ownership of the McAlester Aldridge Hotel, and defendant Hotels Service Company had a combined aggregate annual volume of sales made or business done in an amount of less than $250,000.00.

33. The Alsonett Hotels, including the Aldridge Hotel in McAlester, had, at all times material to this action, an aggregate annual gross volume of sales made or business done in an amount in excess of $2,000,000.00.

34. The Tulsa Apartments, owned by Tulsa Apartments Corporation, are designed for and used as permanent residences and contain one and two bedroom apartments as well as efficiences. An apartment is

equipped with a kitchen containing a range and a refrigerator, a bathroom, bedroom and living room. These apartments provide a mode of living different than that provided by hotels in general or the Aldridge Hotel in particular. They are located in Tulsa, Oklahoma.

35. Although the testimony and evidence is in conflict the court finds that more than one-half of the Aldridge Hotel's annual dollar volume at all times material to this action was derived from transient guests and hotel related activities. This facility was operated and functioned as a hotel.

36. The testimony and evidence is also in conflict concerning whether the defendants Tulsa Apartments Corporation and McAlester Corporation failed to make, keep and preserve accurate records of the daily and weekly hours worked by the employees of the Aldridge Hotel. The plaintiff has failed to meet his burden of proof in this regard and the court finds these defendants have not failed to keep the records as required under 29 U.S.C. § 211(c) (1970) and 29 C.F.R. Part 516 (1975).

37. Defendants Tulsa Apartments Corporation and McAlester Corporation during their respective ownerships of the Aldridge Hotel in McAlester, paid certain Aldridge Hotel employees at rates less than the minimum wages provided in 29 U.S.C. § 206 (1970), as amended (Supp. V, 1975).

III. Conclusions of Law.

1. Jurisdiction.

The court has jurisdiction of this action and the parties. 29 U.S.C. § 217 (1970); 28 U.S.C. §§ 1331, 1337, 1345 (1970).

2. Employers—Employees.

During the period of its ownership of the Aldridge Hotel in McAlester, defendant Tulsa Apartments Corporation was an employer of the employees of the Aldridge Hotel within the meaning of 29 U.S.C. § 203(d) (1970). Defendant McAlester Corporation has been an employer of the employees of the Aldridge Hotel in McAlester from the date it acquired the hotel from defendant Tulsa Apartments Corporation.

[1] There has been no showing, however, that defendant Alberding, living in Chicago, or defendant Scally, living in Tulsa, or defendant Hotels Service Company, whose office was in Tulsa, had "substantial control of the terms and conditions of the work of [the] employees" of the Aldridge Hotel in McAlester, Oklahoma. Falk v. Brennan, 414 U.S. 190, 195, 94 S.Ct. 427, 431, 38 L.Ed. 406 (1973). Here, the "managerial responsibilities" of the employees at the McAlester Hotel were in the hotel manager. The court accordingly concludes that defendants Alberding, Scally and Hotels Service Company were not employers of the employees of the McAlester Aldridge Hotel. Falk v. Brennan, supra; 29 U.S.C. § 203(d) (1970), as amended (Supp. V, 1975); 29 C.F.R. § 779.19 (1975). See also Goldberg v. Whitaker House Cooperative, Inc., 366 U.S. 28, 31-33, 81 S.Ct. 933, 6 L.Ed.2d 100 (1961); Rutherford Food Corp. v. McComb, 331 U.S. 722, 728, 67 S.Ct. 1473, 91 L.Ed. 1772 (1947); United States v. Silk, 331 U.S. 704, 713, 67 S. Ct. 1463, 91 L.Ed. 1757 (1947).

At the onset of the trial a dispute arose between plaintiff and defendants Alberding and Scally concerning whether it was stipulated in the pretrial order that each of them were employers within the meaning of the Act.

The pretrial order is ambiguous on the point, see ¶ III(d) and (e), and the court permitted extensive interrogation by plaintiff of the defendants Alberding and Scally going to all fact questions which have a bearing on whether either of them were employers. On the basis of the evidence adduced the court has concluded they are not employers. The plaintiff cannot have been prejudiced in any way.

3. Enterprise.

The enterprise provision of the Fair Labor Standards Act, as amended, 29 U.S.C. § 203(r) (Supp. V, 1975), states in pertinent part:

> "Enterprise" means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose, and includes all such activities whether performed in one or more establishments or by one or more corporate or other organizational units . . ..

29 U.S.C. § 203(s), as amended (Supp. V, 1975), provides in pertinent part:

> "Enterprise engaged in commerce or in the production of goods for commerce" means an enterprise which has employees engaged in commerce or in the production of goods for commerce, or employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person, and which—
>
> (1) . . . is an enterprise whose annual gross volume of sales made or

business done is not less than $250,000.

. . .

29 U.S.C. § 206, as amended (Supp. V, 1975), provides that "every employer shall pay to each of his employees who . . . is employed in an enterprise engaged in commerce or in the production of goods for commerce" the applicable minimum wage.

29 U.S.C. § 211(c) (1970) provides:

> Every employer subject to any provision of this chapter or of any order issued under this chapter shall make, keep and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this chapter or the regulations or orders thereunder.

[2] The parties agree that in order to subject any of the defendants to the minimum wage and recordkeeping requirements of the Act, they must be found to constitute an enterprise engaged in commerce or in the production of goods for commerce. "An enterprise exists when there are (1) related activities (2) performed through unified operation or common control (3) for a common business purpose." Hodgson v. University Club Tower, Inc., 466 F.2d 745, 746 (10th Cir. 1972).

A. Common Control or Unified Operation.

[3-6] Here, as in University Club Tower, "[t]he question of unified management or common control may be quickly disposed of." 466 F.2d at 746. The evidence does not establish unified operation. The court concludes, however, that the common control requirement has been met. "Separate management does not destroy common control. The requirement is the power of actual control, not the exercise of that power." Hodgson v. University Club Tower, Inc., 466 F.2d 745, 747 (10th Cir. 1972). See Wirtz v. National Bank & Trust Co., 365 F.2d 641, 644 (10th Cir. 1966). Common ownership of the business may be a significant factor in determining control. 29 C.F.R. §§ 770.215—.216, 779. 222—.224 (1975); Brennan v. Plaza Shoe Store, Inc., 522 F.2d 843, 848 (8th Cir. 1975). It cannot seriously be questioned that defendant Alberding and Scally possess the power of actual control with respect to the three corporate defendants as well as the Alsonett Hotels. They are president and vice-president respectively of the corporations involved. Alberding and his family own controlling stock interests in many of the corporations. It follows, that whatever related activities are performed by the corporate defendants and the Alsonett Hotels, if any, they are performed under common control.

B. Related Activities.

The Senate Report prepared in connection with the 1961 amendments to the Act defines related activities as follows:

> [A]ctivities are "related" when they are the same or similar, such as those of the individual retail or service stores in a chain, or departments of an establishment operated through leasing arrangements. They are also

> "related" when they are auxiliary and service activities such as central office and warehousing activities and bookkeeping, auditing, purchasing, advertising, and other services. Likewise, activities are "related" when they are part of a vertical structure such as the manufacturing, warehousing and retailing of a particular product or products under unified operation or common control for a common business purpose. (Emphasis added.)

S.Rep.No.145, 87th Cong., 1st Sess. 41, reprinted in (1961) U.S.Code Cong. & Admin. News, pp. 1620, 1660. Defendants urge that their activities are not related, since they are not the same or similar as those terms have been construed by the United States Court of Appeals for the Tenth Circuit. Defendants rely on the University Club Tower case, in which the circuit court held that apartment buildings serving primarily permanent guests did not perform the same or similar activities as a hotel serving primarily transients, and that they were therefore not engaged in related activities. 466 F.2d at 747-48. Defendants argue that Tulsa Apartments Corporation primarily serves permanent guests while the Aldridge Hotel primarily serves transients and the court has so found. Therefore, defendants argue, their activities are not the same or similar and accordingly not related. In view of the foregoing findings the court must conclude that the activities of the Aldridge Hotel and Tulsa Apartments are not the same or similar. See Hodgson v. University Club Tower, Inc., 466 F.2d 745 (10th Cir. 1972).

This conclusion, however, does not dispose of plaintiff's claim of related activities. This is so because activities which are not the same or similar may

nevertheless be related by virtue of being auxiliary and service activities. See S.Rep.No.145, 87th Cong., 1st Sess. 41, reprinted in (1961) U.S. Code Cong. & Admin.News, pp. 1620, 1660; Wirtz v. First National Bank & Trust Co., 365 F.2d 641, 643 (10th Cir. 1966). Thus, the Tenth Circuit was careful to point out in the University Club Tower case that the activities there involved were not auxiliary. 466 F.2d at 748. The facts as found here conclusively show that defendant Hotels Service Company renders services to the Alsonett Hotels, including the Aldridge Hotel in McAlester, which clearly qualify as auxiliary services under the Act, as interpreted by Senate Report No. 145 and the regulations. See 29 C.F.R. §§ 779.206, 779.208 (1975). The court must accordingly conclude that defendant Hotels Service Company and the Alsonett Hotels, including the Aldridge Hotel in McAlester, are engaged in related activities by reason of numerous auxiliary services furnished. The court further concludes that defendant Tulsa Apartments (apart from the latter's ownership and operation of the McAlester Aldridge Hotel until December 31, 1973) is not engaged in related activities, since it is not engaged in activities which are the same or similar, or auxiliary or integrated. Further, although defendants Alberding and Scally functioned as officers of defendant Hotels Service Corporation in seeing to it that its services were furnished to the Aldridge Hotel and to other Alsonett Hotels, that is precisely the manner in which they did so function—that is to say, as officers. A corporation necessarily must function through its officers. And the facts as found clearly do not demonstrate that Alberding and Scally as individuals, apart from their role as officers, in the various corporations which are here involved, engaged in "related activities" within the meaning of the law. This

action must accordingly be dismissed with respect to defendants Alberding and Scally.

C. Common Business Purpose.

"Generally, the term 'common purpose' will encompass activities . . . which are directed to the same business objective or to similar objectives in which the group has an interest." 29 C.F.R. § 779.213 (1975). "[C]ommon ownership of 'related activities' carries considerable weight toward a determination that there is a 'common business purpose.' " Brennan v. Plaza Shoe Store, Inc., 522 F.2d 843, 848 (8th Cir. 1975). Hotels Service Company and the Alsonett Hotels have more in common than a profit motive. Wirtz v. First National Bank & Trust Co., 365 F.2d 641, 644 (10th Cir. 1966). Their related activities are performed for the common purpose of operating and maintaining hotels in which defendant Alberding owns an interest. See Shultz v. Falk, 439 F.2d 340, 346 (4th Cir.), cert. denied 404 U.S. 827, 92 S.Ct. 62, 30 L.Ed.2d 56 (1971). See also Brennan v. Arnheim & Neely, Inc., 410 U.S. 512, 519, 93 S.Ct. 1138, 35 L.Ed.2d 463 (1973). It cannot be said that the activities of Hotels Service Company and the Alsonett Hotels are performed for "an entirely separate and unrelated business." 29 C.F.R. § 779.213 (1975). The court accordingly concludes that defendant Hotels Service Company and the Alsonett Hotels, including the McAlester Aldridge Hotel, constitute an enterprise in that they perform related activities through common control for a common business purpose. 29 U.S.C. § 203(r) (Supp. V, 1975).

4. Enterprise Engaged in Commerce or in the Production of Goods for Commerce.

The court concludes that the enterprise consisting of defendant Hotels Service Company, defendant McAlester Corporation, and defendant Tulsa Apartments Corporation while it owned the Aldridge Hotel, and the Alsonett Hotels is an enterprise engaged in commerce or in the production of goods for commerce within the meaning of 29 U.S.C. § 203(s)(1) (Supp. V, 1975). See Brennan v. Dillion, 483 F.2d 1334 (10th Cir. 1973).

5. Violations of the Fair Labor Standards Act.

[7] Some employees of the Aldridge Hotel in McAlester were paid at rates less than the minimum wages applicable at the particular time, in violation of 29 U.S.C. § 206 (1970). The court concludes that there is not sufficient evidence to find that the violations of the minimum wage provisions were willful. The concept of "enterprise coverage" as applied to the intricate facts of this case, involves, to say the least, resolution of complex legal issues. Under these circumstances, the failure to pay the Aldridge Hotel employees in accordance with the applicable minimum wage provisions does not constitute a willful violation. Accordingly, the two year statute of limitations applies. 29 U.S.C. § 255(a) (1970). Further, as the court has previously found, there has been no violation of the recordkeeping provisions of the Act as required under 29 U.S.C. §§ 211(c), 215(a)(5) (1970) and 29 C.F.R. Part 516 (1975).

IV. Disposition.

Pursuant to 29 U.S.C. § 217 (1970) defendants McAlester Corporation and Tulsa Apartments Corporation in connection with their ownership of the Aldridge Hotel at McAlester are enjoined from withholding the

payment of minimum wages to employees of the Aldridge Hotel during the period from May 1, 1973, until November 11, 1976. This restraint applies to defendant Tulsa Apartments Corporation only in connection with its ownership of the Aldridge Hotel during the period relevant to this action, to-wit: From May 1, 1973 until December 31, 1973. Similarly, this restraint applies to defendant McAlester Corporation only in connection with its ownership of the Aldridge Hotel during the period relevant to this action, to-wit: From January 1, 1974 until November 11, 1976. To the amounts owing as back wages to the Aldridge Hotel employees, there shall be added interest at the rate of 6 (six) percent per annum from the date such amounts became due, or from May 1, 1973, whichever is later.

Defendant McAlester Corporation is permanently enjoined, pursuant to 29 U.S.C. § 217 (1970), from violating 29 U.S.C. § 215(a)(2) (1970).

The action is dismissed as to defendants Alberding, Scally and Hotels Service Corporation.

The parties are hereby directed to submit to the court, within thirty days from this date, a judgment granting relief in conformity with this opinion, which contains a determination of the amount due to employees of the Aldridge Hotel at McAlester by reason of withheld payments of minimum wages. In this connection, the parties are advised if defendants' records prove not to be fully adequate for purposes of determining the amount due to the employees, they should proceed in a manner consistent with Hodgson v. Humphries, 454 F.2d 1279 (10th Cir. 1972), in determining the amounts due to the employees and may utilize the data set forth in Plaintiff's Exhibit 45.

Supreme Court, U.S.
FILED
JUL 3 1980
MICHAEL RODAK, JR., CLERK

No. 79-1792

In the Supreme Court of the United States

OCTOBER TERM, 1979

MCALESTER CORPORATION, ET AL., PETITIONERS

v.

RAY MARSHALL, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1792

MCALESTER CORPORATION, ET AL., PETITIONERS[1]

v.

RAY MARSHALL, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

This is an action for enforcement of the minimum wage requirements of the Fair Labor Standards Act, 29 U.S.C. 201 *et seq.*[2] Petitioners seek review of the determination by the district court and the court of appeals that the Aldridge Hotel in McAlester, Oklahoma, is part of an "enterprise engaged in commerce" and, accordingly, is subject to the Act. See 29 U.S.C. 206.

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[1]Hotels Service Company, Tulsa Apartments Corporation, Charles H. Alberding and J.E. Scally are also petitioners in this action.

[2]The Secretary also had charged petitioners with violating the Act's recordkeeping provisions, but the district court held that the Secretary failed to meet his burden of proof on that issue. Supp. App. B12 ("Supp. App." refers to the Supplemental Appendix to the petition for a writ of certiorari, which contains the opinion of the district court). The Secretary did not appeal from that ruling.

1. The Act provides that separate corporate units or establishments that are under common control constitute a single "enterprise" if, *inter alia*, they perform "related activities." 29 U.S.C. 203(r). *Brennan* v. *Arnheim & Neely, Inc.*, 410 U.S. 512 (1973). An enterprise is "engaged in commerce," and therefore covered by the Act, if it has gross annual revenues of at least $250,000. 29 U.S.C. 203(s)(1).

The Aldridge Hotel is one of some 34 hotels, known as the "Alsonett Hotels," that are owned and operated by corporations controlled by petitioner Charles Alberding (Pet. App. A3).[3] The district court found that the Alsonett Hotels constitute an enterprise within the meaning of the Act (Supp. App. B19) and that the enterprise has gross annual revenues in excess of $2 million (Supp. App. B11). It accordingly held that the hotels are subject to the Act's minimum wage requirements. On appeal, petitioners

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[3]Petitioner Charles Alberding is president and petitioner J.E. Scally is vice-president of some 34 corporations. Petitioner Alberding, his wife and daughters together own a controlling interest in each of the corporations, and Alberding, his wife and petitioner Scally comprise the board of directors of each corporation. With the exception of petitioner Tulsa Apartments Corporation, which owns an apartment house, each of the 34 corporations individually owns and operates an Alsonett hotel.

The Aldridge Hotel is owned by petitioner McAlester Corporation. During a previous time period material to this action, it was owned by petitioner Tulsa Apartments Corporation. Both corporations are among those controlled by petitioner Alberding and his immediate family. Pet. App. A3; Supp. App. B3-B6.

Petitioner Hotel Services Company, which is jointly owned by petitioner Alberding's wife and petitioner Scally and of which petitioner Alberding is president, provides auxiliary services, such as engineering, insurance and financial services, to the Alsonett Hotels. Pet. App. A3.

conceded that the hotels comprise a single enterprise,[4] but argued that the only proof in the record that the enterprise's revenues exceed $250,000 annually was certain business records, which, petitioners claimed, had been improperly admitted into evidence. The court of appeals rejected this contention and affirmed the district court's decision that the hotels are within the Act's coverage (Pet. App. A3-A4).[5]

2. Petitioners now assert that the Alsonett Hotels do not constitute an "enterprise" within the meaning of the Act, because the hotels do not engage in "related activities." They argue, therefore, that it was error to aggregate the revenues of those hotels in order to meet the Act's jurisdictional minimum (Pet. 8-10). But, as noted above, petitioners failed to raise this claim in the court of appeals. The settled rule is that this Court ordinarily will not review an issue neither raised in nor considered by the court of appeals, even if it was raised in the district court. See, *e.g.*, *Adickes* v. *Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); *Duignan* v. *United States*, 274 U.S. 195, 200 (1927); *United States* v. *Mendenhall*, No. 78-1821 (May 27, 1980), slip op. 6 n.5. Accordingly, further review is not warranted.

3. In any event, the district court's factual finding that petitioners' hotels are engaged in related activities is manifestly correct and does not conflict with the decision of any other court. Activities are "related" within the

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[4]The court of appeals noted that "[d]efendants on appeal do not dispute the proposition that the hotels owned by Charles Alberding may be considered together with the Aldridge Hotel to constitute a single 'enterprise' " (Pet. App. A4).

[5]The court of appeals reversed that part of the district court's decision that held that the individual petitioners, Charles Alberding and Joseph Scally, are not "employers" for the purposes of the Act (Pet. App. A4-A6). Petitioners do not seek review of this ruling.

meaning of the Act if they are "the same or similar." *Brennan* v. *Arnheim & Neely, Inc., supra,* 410 U.S. at 518; S. Rep. No. 145, 87th Cong., 1st Sess. 41 (1961).[6] The activities of the individual corporations that make up the Alsonett Hotels are obviously the same or similar since, as the district court found, each is engaged in the operation of a hotel (Supp. App. B4-B5). The district court's finding was abundantly supported by petitioner Alberding's own testimony that all of the Alsonett Hotels are hotels, as their name implies, and that "all of them receive transient guests[,] all of them have desk clerks, maid service, things of that nature that are normally associated with hotels" (Tr. 58; see also Tr. 104).[7] Contrary to petitioner's contention (Pet. 9-11), testimony to the effect that some of the Alsonett Hotels have accommodations for permanent guests and make an effort to attract permanent guests (Tr. 144) is not inconsistent with their status as hotels.

Petitioners rely on *Hodgson* v. *University Club Tower, Inc.*, 466 F. 2d 745 (10th Cir. 1972), which held that the activities of a corporation engaged exclusively in the operation of a hotel and those of a corporation engaged exclusively in the operation of ordinary apartment houses were not "related" within the meaning of the Act. But that decision is not contrary to the district court's decision here, since, by petitioner Alberding's admission, each of

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[6]Activities also are related if they are "auxiliary." S. Rep. No. 145, *supra,* at 41. The district court found that petitioner Hotels Service Company was part of the enterprise because it provided auxiliary services, such as engineering, insurance, and financial services, to the Alsonett Hotels (Supp. App. B18).

[7]"Tr." refers to the trial transcript.

the corporations included in the instant enterprise operates a hotel.[8]

4. Petitioners' additional assertion (Pet. 11-13) that the district court erred in admitting the hotel business records is simply irrelevant. As the court of appeals recognized (Pet. App. A4), petitioner Alberding's admission that his hotels have gross annual revenues in excess of $2 million (Tr. 77) provided ample support, apart from the business records, for the district court's finding that the enterprise's revenues exceed the Act's $250,000 jurisdictional minimum.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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[8]Indeed, relying on *Hodgson* v. *University Club Tower, Inc., supra*, the district court excluded the Tulsa Apartments Corporation (except for its period of ownership of the Aldridge Hotel) from its determination of the extent of the enterprise, because it found that, unlike the corporations that own the Alsonett Hotels, the Tulsa Apartments Corporation operates an apartment building (Supp. App. B17-B18).